Supreme Court, U. S.
FILED
NOV 4 1977
MICHAEL RODAK, JR., CLERK

No. 77-519

In the Supreme Court of the United States

OCTOBER TERM, 1977

JAMES NEWCOMB,

Petitioner,

vs.

JAMES BRENNAN and HENRY REUSS,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT HENRY REUSS IN OPPOSITION

ROBERT H. FRIEBERT
710 North Plankinton Avenue
Milwaukee, Wisconsin 53203
(414) 271-0130
Attorney for Respondent,
HENRY REUSS.

Of Counsel:
FRIEBERT & FINERTY

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

INDEX

PAGE

Statement of the Case 1

Argument 4

I. This Court Does Not Have Jurisdiction To Entertain All The Questions Presented For Review By The Petitioner 4

II. The Decision Of The Court Of Appeals For The Seventh Circuit Is Not In Conflict With Applicable Decisions Of This Court And Is Not Of Sufficient Importance To Require Resolution By This Court 6

Conclusion 10

AUTHORITIES CITED

Cases

Borchlewicz v. Partipilo, 44 F.R.D. 540 (E.D. Wis. 1968) 3

Correa Velez v. De Jesus Schuck, 396 F. Supp. 1256 (D.P.R. 1975) 10

CSC v. Letter Carriers, 413 U.S. 548 (1973) 7

Elrod v. Burns, 427 U.S. 347 (1976) 7, 8, 10

Gaillibeau v. City of Richmond, 417 F. 2d 426 (9th Cir. 1969) 3

Giannaris v. Frank, 387 F. Supp. 570 (N.D. Ill. 1974) 10

Gould v. Walker, 356 F. Supp. 421 (N.D. Ill. 1973) 10

Illinois State Employees Union Council 34 v. Lewis, 473 F. 2d 561 (7th Cir. 1972) 10

PAGE

Jafree v. Scott, 372 F. Supp. 264 (N.D. Ill. 1974) aff'd in part, rev'd in part, 591 F. 2d 1405 (7th Cir. 1975) (unpublished opinion) 10

Mitchell v. King, 537 F. 2d 385 (10th Cir. 1976) 10

Muir v. County Council of Sussex County, 393 F. Supp. 915 (D. Del. 1975) 10

Nunnery v. Barber, 503 F. 2d 1349 (4th Cir. 1974) 2

United Public Workers v. Mitchell, 330 U.S. 75 (1949) 7

United States v. Ortiz, 422 U.S. 891 (1975) 4

Weise v. Reisher, 318 F. Supp. 580 (E.D. Wis. 1970) 3

Other Authorities

5 U.S.C. §7324(a)(2) 7

C.F.R. §733.122(6) 7

Rule 19, Rules of Sup. Ct. 7

Rule 23,1(c), Rules of Sup. Ct. 5

Rule 28(a)(2), Fed. R. App. P. 4

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-519

JAMES NEWCOMB,

Petitioner,

vs.

JAMES BRENNAN and HENRY REUSS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT HENRY REUSS IN OPPOSITION

STATEMENT OF THE CASE

This case was presented to the Court of Appeals for the Seventh Circuit on appeal from an order of the United States District Court for the Eastern District of Wisconsin granting the defendants' motions to dismiss the com-

plaint. Given that history, the facts which must be accepted in considering the Petition are the allegations of the petitioner as contained in his complaint.

On April 26, 1976, the petitioner, James Newcomb, the former Deputy City Attorney for the City of Milwaukee, announced his candidacy for the Fifth United States Congressional District seat held by one of the respondents, Congressman Henry Reuss. One week later, on May 3, 1976, the petitioner was discharged by his superior, the other respondent, City Attorney James Brennan. According to the complaint, Brennan had told Newcomb prior to April 26, 1976, the date of Newcomb's announcement of candidacy, that if Newcomb decided to run against Reuss, he could not remain in his employment as Deputy City Attorney.

The complaint alleges in paragraph 1 that the petitioner was employed by the City of Milwaukee as Deputy City Attorney prior to May 3, 1976. It is this employment which was terminated on May 3, 1976. The complaint fails to allege that the petitioner was not in an executive, policymaking position. Likewise, the complaint fails to allege that the petitioner did not engage in policymaking decisions in his employment as Deputy City Attorney.[1]

With respect to Congressman Henry Reuss, the complaint *avers upon information and belief,* in paragraph 6, that Brennan communicated with Reuss prior to April 26,

[1] The petitioner urged in the Court of Appeals that it was error for the trial court to conclude on the basis of studying applicable Wisconsin and City of Milwaukee law that the petitioner was a policymaker. His Petition for a Writ of Certiorari does not assert this issue for review by this Court. It thus can be assumed at this juncture that the petitioner concedes he was in a policymaking position. Cf. *Nunnery* v. *Barber,* 503 F. 2d 1349 (4th Cir. 1974).

1976, about Newcomb's candidacy. Likewise, the complaint alleges *upon information and belief,* in paragraphs 5, 6 and 9, that a conspiracy [2] was formed between Brennan and Reuss and others to discharge the petitioner Newcomb if he did not withdraw his candidacy.

[2] The petitioner in his Petition for a Writ of Certiorari transforms these critical allegations from his speculative beliefs to established facts. They are not true. Although Congressman Reuss recognizes that the Court must accept these assertions, even though presented upon information and belief, in the limited context of considering the Petition, he objects to their being elevated into the status of established facts in the Statement of the Case. Additionally, Congressman Reuss moved to make the complaint more definite and certain in the trial court because the complaint merely alleged that there was a conspiracy without setting forth any details or making any other factual allegations, relying upon *Gaillibeau* v. *City of Richmond,* 417 F. 2d 426, 430 (9th Cir. 1969) and *Weise* v. *Reisher,* 318 F. Supp. 580, 584 (E.D. Wis. 1970), quoting from *Borchlewicz* v. *Partipilo,* 44 F.R.D. 540, 542 (E.D. Wis. 1968). Neither court below was required to resolve this motion due to the granting of the motion to dismiss. However, the flimsy allegations in the complaint demonstrate how easy it is to hale public officials into court without requiring pleadings to contain more than uninformed conclusions.

ARGUMENT

I.

THIS COURT DOES NOT HAVE JURISDICTION TO ENTERTAIN ALL THE QUESTIONS PRESENTED FOR REVIEW BY THE PETITIONER.

This Court specifically held in *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975), that an issue which was not raised before the Court of Appeals would not be considered "for the first time in the Petition for Certiorari." Rule 28(a)(2), Fed. R. App. P., requires an appellant to present "a statement of the issues presented for review." Since the petitioner here is asking the Court to review a decision of the United States Court of Appeals for the Seventh Circuit, the Court should look to see whether the petitioner presented the issues which he claims were erroneously decided by that court or whether the issues which he raises here were fairly encompassed in his Statement of the Issues as presented to the Court of Appeals below. If the petitioner failed to present all issues to the Court of Appeals, then the Court is without jurisdiction to review those issues which are sought to be reviewed here but which were not presented below.

The petitioner in his brief to the United States Court of Appeals for the Seventh Circuit presented the following Statement of the Issues:

> "1. In its ruling on the defendants' Rule 12(b)(6) motions to dismiss, did the District Court err when it considered facts outside the complaint without any notice to the plaintiff that it would do so and without indicating that it would consider the issues as if on a motion for summary judgment?

> "2. In its ruling on the defendants' Rule 12(b)(6) motions to dismiss, did the District Court err when it assumed, without factual basis and without an evidentiary hearing, that plaintiff occupied a 'policy making' position as Deputy City Attorney of Milwaukee, Wisconsin?
>
> "3. Assuming *arguendo* that the District Court properly concluded that plaintiff occupied a policy-making position as Deputy City Attorney, did his complaint, alleging that he had been fired by the City Attorney of Milwaukee, acting in concert with defendant Reuss, solely because he had decided to become a candidate for the office of Fifth District Representative to the United States Congress, state a claim for which relief can be granted?"

Included within the Questions Presented for Review to this Court, as set forth at page 2 of the Petition for Writ of Certiorari, are two issues which were not presented to the Court of Appeals either directly or as subsidiary questions fairly comprised in the Statement of the Issues as presented. Cf. Rule 23,1(c), Rules of Sup. Ct. Those issues not presented below are whether the Court of Appeals erred "(A) in holding that the petitioner served 'at the pleasure' of his employer" and "(C) in failing to address the equal protection cause of action pleaded as a second cause of action in the complaint. . . ."

The petitioner's complaint does not assert that he had a property interest in his job. The United States District Court for the Eastern District of Wisconsin, after carefully analyzing State of Wisconsin and City of Milwaukee law, held that the petitioner served at the pleasure of his employer. See Appendix 12. The petitioner did not challenge that interpretation of Wisconsin law by the

District Court. The petitioner did not assert in his brief to the Court of Appeals that he had a property interest in this job. He should not be allowed to obtain review of that finding for the first time in the United States Supreme Court on a Petition for Writ of Certiorari.

With respect to the equal protection claim, it is clear that that issue was abandoned on appeal to the Court of Appeals. The Statement of Issues presented to the Court of Appeals does not assert the equal protection claim. The brief of the petitioner presented to the Court of Appeals at no place challenges the trial court's denial of the equal protection claim. Therefore, the petitioner should not have been surprised that the Court of Appeals did not address a question which he did not properly present. There is nothing to review from the Court of Appeals on this issue because the petitioner failed properly to ask that court to decide that issue. The petitioner should not be allowed to resurrect an abandoned position in the United States Supreme Court without having first given the Court of Appeals an opportunity to review the question.

II.

THE DECISION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT IS NOT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND IS NOT OF SUFFICIENT IMPORTANCE TO REQUIRE RESOLUTION BY THIS COURT.

The petitioner assumes that because a particular fact situation is one of apparent first impression, it necessarily follows that a resolution by this Court is in order. The considerations which govern the granting of a petition

for a writ of certiorari, as summarized in Rule 19, Rules of Sup. Ct., are whether the decision of the court below is in conflict with applicable decisions of this Court, or whether the question is important enough to require settlement by this Court.

The petitioner now apparently concedes that he was a policymaker. He makes no argument in his petition here questioning that part of the decision of the Court of Appeals which held that as a matter of law he was a policymaker and subject to the rule of *Elrod* v. *Burns*, 427 U.S. 347 (1976). The "unique" question which the petitioner presents is whether an admitted policymaker can be discharged for political reasons other than his failure to join a political party as mandated by his superior. The issue is not significant enough to require the decision of this Court in that it is really nothing more than a restatement of *Elrod*. The decision of the Court of Appeals for the Seventh Circuit does not stray at all from the constitutional principles enunciated therein so as to require further appraisal of that decision in light of these particular facts.

This Court has already held in *CSC* v. *Letter Carriers*, 413 U.S. 548 (1973) and *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1949), that Congress could validly enact legislation prohibiting persons in the federal classified civil service from engaging in political activity on their own time, including running for political office. The penalty under the Hatch Act [5 U.S.C. §7324(a)(2); C.F.R. §733.122(6)] for running for partisan political office can be dismissal. Under the Hatch Act an employee can be fired for engaging in partisan political activities on his own time even though the political activities do not interfere with the ability of

the employee to perform his job. Although First Amendment rights were implicated, in those cases, the Court held that such political prohibitions did not violate the Constitution.

Likewise, in *Elrod* v. *Burns, supra,* the Court held that policymakers could be discharged for political reasons, despite their claims of implicated rights. The particular political reason involved in *Elrod* was the requirement that such employees join particular political parties. The Court held that policymakers could be forced to join a particular political party as a condition to keeping their jobs.

The asserted right involved in this case is the right to run for public office. The decision of the Court of Appeals was that *Elrod* swept broadly enough to authorize superiors to require their subordinate policymakers to refrain from running for political office as a condition to keeping their policymaking jobs. That decision below does not really represent any extension of the *Elrod* decision. There are but minor threats to the smooth and effective operation of an office due to the refusal of a policymaker to join a political party. However, there are outright policy problems which can develop as a result of a policymaker running for political office.

The Deputy City Attorney officially acts in the name of City Attorney Brennan. Even assuming that it is possible for candidate Newcomb to separate his political functions as a candidate and his political functions as a policymaker, the fact remains that during the course of the campaign, there would be a substantial overlapping of roles. In these situations, the policymaker might be tempted to place his electioneering goals above his duty as a policymaker.

Milwaukee City Attorney's office policy decisions made by the Deputy City Attorney exercising the authority of the City Attorney involving zoning problems, City contract negotiations, prosecutions of building code violations, civil litigation, settlement decisions, and the like could be affected consciously or unconsciously upon considerations of personal political campaign support, financial or otherwise. It is certainly within the power of the City Attorney to conclude that his Chief Deputy and policymaker could not run for political office and remain on his job.

As stated by the Court of Appeals:

> "The elected official responsible for setting the policy of the city attorney's office is the city attorney himself. One of the major problems that he confronts in his job is insuring that his policies are carried out by his subordinates, and that any policy-creating decisions made by those subordinates conform with the broad objectives he chooses to pursue. This problem would become a nightmare for the city attorney unless he could demand the absolute loyalty of his policymaking deputy. If he lost confidence in his deputy, for whatever reason, his ability to perform his job would be severely hampered. Moreover, once an open rift developed between the city attorney and his deputy—even if the basis for the feud were unrelated to actual job performance—the city attorney's office could become a battleground in which little was accomplished, to the detriment of the citizens of Milwaukee. It is presumably for this reason that the Milwaukee City Charter and City Code permit the city attorney unfettered discretion to select his deputy and exclude the position of deputy city attorney from the civil service tenure which lesser attorneys in the city attorney's office receive." Appendix, 8-9.

This conclusion by the Court of Appeals below is not contrary to other federal court decisions [3], is in accordance with the *Elrod* decision and does not involve a significant enough question to require further comment by this Court. Simply stated, policymakers can be fired for political reasons.

CONCLUSION

The one issue properly presented to this Court in the petition is not important enough to require settlement by this Court, and the decision below is not in conflict with applicable decisions of this Court. On the basis of the foregoing, therefore, it is respectfully requested that the Court deny the Petition for Writ of Certiorari to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

ROBERT H. FRIEBERT
710 North Plankinton Avenue
Milwaukee, Wisconsin 53203
(414) 271-0130
Attorney for Respondent,
Henry Reuss

Of Counsel:
FRIEBERT & FINERTY

---

[3] *Mitchell* v. *King*, 537 F. 2d 385 (10th Cir. 1976); *Correa Velez* v. *De Jesus Schuck*, 396 F. Supp. 1256, 1259 (D.P.R. 1975); *Muir* v. *County Council of Sussex County*, 393 F. Supp. 915 (D. Del. 1975); *Jafree* v. *Scott*, 372 F. Supp. 264 (N.D. Ill. 1974) aff'd in part, rev'd in part, 591 F. 2d 1405 (7th Cir. 1975) (unpublished opinion); *Gould* v. *Walker*, 356 F. Supp. 421 (N.D. Ill. 1973); *Giannaris* v. *Frank*, 387 F. Supp. 570 (N.D. Ill. 1974); *Illinois State Employees Union Council 34* v. *Lewis*, 473 F. 2d 561 (7th Cir. 1972).